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10/599,663	07/20/2007	Dusan Miljkovic	100700.0033US	2456

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FISH & ASSOCIATES, PC
ROBERT D. FISH
2603 Main Street
Suite 1000
Irvine, CA 92614-6232

EXAMINER	
FLOOD, MICHELE C	
ART UNIT	PAPER NUMBER
1655	
MAIL DATE	DELIVERY MODE
12/10/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/599,663	MILJKOVIC, DUSAN	
	Examiner	Art Unit	
	MICHELE FLOOD	1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *09 September 2009*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3-18 and 20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,3-18 and 20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application.
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on September 9, 2009 has been entered.

Claims 1, 3-18 and 20 are under examination.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 7, as amended, is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The claim is rejected for failing to provide prior support or antecedent basis for the language "further comprising as an additional ingredient an extract prepared from at least two of a bean of the *Coffea spec.* (coffee cherry), a pulp of the *Coffea*

spec. (coffee), a mucilage of the *Coffea spec.* (coffee) cherry, and a hull of the *Coffea spec.* (coffee) cherry". Newly applied as necessitated by amendment.

Claim 7, as set forth in the amendment filed on October 3, 2008, now recites, "The cosmetic composition of claim 1 further comprising as an additional ingredient an extract prepared from at least two of a bean of the *Coffea spec.* (coffee cherry), a pulp of the *Coffea spec.* (coffee), a mucilage of the *Coffea spec.* (coffee) cherry, and a hull of the *Coffea spec.* (coffee) cherry".

Insertion of the above mentioned claim limitation has no support in the as-filed specification. The insertion of the limitation is a new concept because it neither has literal support in the as-filed specification by way of generic disclosure, nor are there specific examples of the newly limited genus which would show possession of the aforementioned broadened concept. There are only exemplified compositions comprising a cosmetic composition comprising a composition prepared from a whole Coffea spec (coffee) cherry. This is not sufficient support for the new genus. This is a matter of written description, not a question of what one of skill in the art would or would not have known. The material within the four corners of the as-filed specification must lead to the generic concept. If it does not, the material is new matter. Declarations and new references cannot demonstrate the possession of a concept after the fact. Thus, the insertion of the above mentioned claim limitation is considered to be the insertion of new matter for the above reasons.

As the above mentioned claim limitation could not be found in the present specification, the recitation of the claim limitation is deemed new matter; and,

therefore it must be omitted from the claim language, unless Applicant can particularly point to the specification for literal support.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 3, 5 and 7-11, as amended, are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Newly applied as necessitated by amendment.

Regarding Claim 3, the phrase "such as" renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention.

Claim 5 recites, "The cosmetic composition of claim 4 wherein the *Coffea spec.* (coffee) cherry is quick-dried under a protocol that limits a mycotoxin level of the *Coffea spec.* (coffee cherry) is less than 20 ppb (part-per-billion) for total aflatoxins, less than 10 ppb for total ochratoxins, and less than 5 ppm for total fumonisins"; and, therefore the metes and bounds of the claim are considered uncertain as it is unclear as to whether Applicant has omitted a word, given that the present claim language is nonsensical.

Claim 7 recites the limitation, "further comprising as an additional ingredient an extract prepared from at least two of a bean of the *Coffea spec.* (coffee) cherry, a pulp of the *Coffea spec.* (coffee) cherry, a mucilage of the *Coffea spec.* (coffee) cherry, and a hull of the *Coffea spec.* (coffee) cherry",

which renders the metes and bounds of the claimed invention vague and indefinite. For instance, the preamble of Claim 1, from which Claim 7 directly depends, recites "A cosmetic composition comprising a composition prepared from a whole *Coffea spec.* (coffee) cherry"; and, thus it is unclear as to what is the criticality for the requirement that the claimed composition is prepared from a ' whole *Coffea spec.* (coffee) cherry', if only two portions of the claim-designated plant material is required in the making of the claimed 'further' comprising an extract prepared therefrom. Thus, as presently drafted, the limitations of Claim 7 appear to negate the subject matter encompassing the scope of the preamble recited in Claim 1. The lack of clarity renders the claimed subject matter ambiguous and confusing.

Claim 8 recites the limitation "the extract" in line 5. There is insufficient antecedent basis for this limitation in the claim.

The metes and bounds of Claims 8 and 9 are rendered uncertain because the percentage amounts of the ingredients are not set forth in terms of either "by weight" or "by volume" percentage amount of the total weight amount of the composition. The lack of clarity renders the claims indefinite since the resulting claims do not clearly set forth the metes and bounds of the patent protection desired.

All other cited claims depend directly or indirectly from rejected claims and are, therefore, also, rejected under U.S.C. 112, second paragraph for the reasons set forth above.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1 and 3-15, as amended, are rejected under 35 U.S.C. 103(a) as being unpatentable over Bertrand et al. (U) in view of Linter. (N); and, further in view of Soucy (A*), Fabian (B*), Olkku et al. (C) and Miljkovic et al. (D*), and Batista et al. (V) and Frank (W).

Bertrand teaches extraction of chlorogenic acids from frozen whole *Coffea spec.* (coffee) cherry with methanol-water. See page 1356, under "*Material and methods*" at 4 different stages of maturity.

The teachings of Bertrand are set forth above. Bertrand does not specifically teach a cosmetic composition. However, it would have been obvious to one of ordinary skill in the art to use the whole coffee cherry extract taught by Bertrand to prepare the instantly claimed composition because at the time of the

invention Lintner taught a cosmetic composition comprising chlorogenic acid from coffee extract and shea butter extracts for soothing the skin and reducing inflammation, lines and wrinkles, by combating effects of free radicals and containing coffee and shea butter extracts. Lintner taught cosmetic and dermatological compositions in the form of emulsions, milks, lotions, gels, creams, sticks, crayons, sprays and shampoos comprising the chlorogenic acid. At the time the invention was made, one of ordinary skill in the art would have been motivated and one would have had a reasonable expectation of success to use the Bertrand' composition in the making of the claimed invention because Lintner taught that chlorogenic acid from coffee was useful in the making of cosmetic composition; and, Bertrand taught that the concentrations of chlorogenic acids increase during the maturation of a coffee cherry.

The combined teachings of Bertrand and Linter do not specifically teach a cosmetic composition wherein the coffee is a quick-dried such that a mycotoxin level of the *Coffea spec.* (coffee) cherry is less than 20 ppb (part-per-billion) for total aflatoxins, less than 10 ppb for total ochratoxins, and less than 5 ppm for total fumonisins; and any of the additional claim-designated ingredients as recited in Claim 7 or any of the claim-designated ingredients recited in any of Claims 8-11. However, it would have been obvious to one of ordinary skill in the art to subject the coffee cherry used in the making of the cosmetic composition taught by the references to a quick-drying protocol to provide the instantly claimed inventions because at the time the invention was made studies showed that *Aspergillus, Penicillium* and *Fusarium* are natural coffee contaminants

having the potential to produce aflatoxins, ochratoxins, and fumonisins which are detrimental to the quality and safety of the final product (*see* Batista and Frank); and, Soucy, Fabian, Olkku and Miljkovic teach quick-dry methods for reducing the number of the toxigenic fungal genera and mycotoxin contaminants in coffee cherry or coffee bean products, or similar crops. Firstly, Soucy teaches an apparatus for drying whole coffee beans, coca beans (whole coffee cherry), and various grains. Soucy further teaches that the drying apparatus provides a simple solar powered dryer system for the removal of moisture from bulk materials such as whole coffee cherries which significantly reduces the moisture content. Secondly, Fabian teaches a process for removing mycotoxins that may be present in green coffee, such as aflatoxins and ochratoxins, by solvent extraction and exposure to high temperature and water vapor such that the coffee beans become porous and permeable for the rapid removal of mycotoxins. Thirdly, Olkku teaches a heat treatment method for decreasing the mold content and the mycotoxin level in seed products comprising quick-drying the kernels for a short period of time at a temperature range. Olkku also teaches that the method is useful in killing field fungi, such as Aspergillus, Penicillin and Fusarium, and reducing the content of mycotoxins, including aflatoxins, ochratoxins and fumonisins by reducing the moisture content of the crops. Finally, Miljkovic teaches a composition comprising a composition prepared from whole coffee cherry, wherein the whole coffee cherry is a sub-ripe coffee cherry, and wherein the sub-ripe cherry is quick-dried such that a mycotoxin level of the coffee cherry is less than 20 parts per billion (ppb) for total aflatoxins, less than

10 ppb for total ochratoxins, and less than 5 parts per million (ppm) for total fumonisins. See [0048]. The coffee cherry extract comprises at least one an aqueous extract and an alcoholic extract from at least two of a bean of the coffee cherry, a pulp of the coffee cherry, a mucilage of the coffee cherry and a hull of the coffee cherry and comprises coffee acids (chlorogenic acid, ferulic acid and caffeic acid), high molecular weight polysaccharides (deemed to inherently comprise essential monosaccharides selected from the group consisting of arabinose, fucose, mannose, xylose and galactose) in the claim-designated percentage ranges. At the time the invention was made, one of ordinary skill in the art would have been motivated and one would have had a reasonable expectation of success to quick-dry the coffee cherry used in the making of the composition taught by the combined references to provide the instantly claimed inventions because Soucy teaches that the drying apparatus provides an expensive, simple solar powered dryer system for the removal of moisture from bulk coffee materials without overdrying and suggests that the drying system is better than conventional passive solar drying time which is too long and subject to exposure to detrimental weather conditions that do not safeguard against excess moisture and possible mold contamination or formation in the coffee crops (see Columns 1 and 2 in their entirety); Fabian teaches that the referenced method effectively removes mycotoxins from green coffee under conditions that do not reduce caffeine quality; Olkku teaches that quick drying crops subject to field fungi contamination is useful in decreasing mold content and levels of mycotoxins present in plant seeds without reducing the biological activity of the

heat treated plant material; and, Miljkovic teaches that large amounts of polyphenolic compounds and essential monosaccharides and polysaccharides can be extracted from whole coffee cherry which is quick-dried and that quick-drying a whole coffee cherry reduces mycotoxins indigenous to coffee cherry and coffee cherry extracts obtained therefrom; and, thus one would have had a reasonable expectation that the prior art quick-drying protocols would be equally applicable to the drying of whole coffee cherries that are either primarily red or almost red to reduce a mycotoxin level of the coffee cherries as disclosed by Applicant to provide the instantly compositions.

Accordingly, the claimed invention was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

Claims 15-18 and 20 rejected under 35 U.S.C. 103 (a) as being unpatentable over Bertrand et al. (U) in view of Linter. (N), Soucy (A*), Fabian (B*), Olkku et al. (C*) and Miljkovic et al. (D*), and Batista et al. (V) and Frank (W) in view of The Free Dictionary by Farlex. "Marketing". http://financial-dictionary.thefreedictionary.com/marketing (X; Downloaded December 8, 2007.

The combined teachings of Bertrand, Lintner, Soucy, Fabian, Olkku, Miljkovic, Batista and Frank are set forth above. The combined references do not teach a method of marketing the instantly claimed composition. However, The Free Dictionary by Farlex the concept of marketing a product generally entails the following aspects:

> "The activities of a company associated with buying and selling a product or service. It includes advertising, selling and delivering products to people. People who work in marketing departments of companies try to get the attention of target audiences by using slogans, packaging design, celebrity endorsements and general media exposure. The four 'Ps' of marketing are product, place, price and promotion. Notes: Many people believe that marketing is just about advertising or sales. However, marketing is everything a company does to acquire customers and maintain a relationship with them. Even the small tasks like writing thank-you letters, playing golf with a prospective client, returning calls promptly and meeting with a past client for coffee can be thought of as marketing. The ultimate goal of marketing is to match a company's products and services to the people who need and want them, thereby ensure profitability".

Thus, given the teachings of the combined teachings as a whole, the instantly claimed method would have been *prima facie* obvious because a method of marketing a cosmetic composition wherein the information about the cosmetic product is printed on at least one of a container containing the formulation and a package containing the container would have been well within the purview of one ordinary skill in the art at the time the invention was made. One of ordinary skill in the art would have been motivated and one would have had a reasonable expectation of success to modify the teachings of the combined references to provide the instantly claimed method of marketing a cosmetic prepared from a whole *Coffea spec.* (coffee) cherry, wherein the whole *Coffea spec.* (coffee) cherry used for the composition prepared from the whole *Coffea spec.* (coffee) cherry is a sub-ripe, quick-dried *Coffea spec.* (coffee) cherry that has a mycotoxin level of less than 20 ppb (part-per-billion) for total aflatoxins, less than 10 ppb for total ochratoxins, and less than 5 ppb for total fumonisins because the

combined references provide detailed information heralding the beneficial functional activities of the product upon application, as well as all of the ingredients and amounts of ingredients used in the making of the reference formulations. Therefore, the instantly claimed method would have been no more than a matter of routine optimization to provide a result effect variable for the commercialization of the cosmetics taught by the combined teachings, especially since the information associated with such a composition would promote and emphasize the fact that it was low in mycotoxins; and, therefore non-toxic and fit for human use. Furthermore, common sense would have dictated and rendered the claimed method of marketing *prima facie* obvious to one of ordinary skill in the art because at the time the invention was made it was old and conventional in the art of marketing a cosmetic, such as the skin and hair compositions taught by the combined references, that the placement of printing or printed material on a container detailing information about the cosmetic, as well as on the packaging the container, was beneficial in providing a vehicle for containing the product and a viable means for the mass distribution, delivery and storage of the product wherein the printed information on the container provides a means for the identification, promotion and sale of a product to a consumer base in want or need of a cosmetic product having beneficial functional effects.

Accordingly, the claimed invention was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

* Applicant is advised that the cited U.S. patents and patent application publications are available for download via the Office's PAIR. As an alternate source, all U.S. patents and patent application publications are available on the USPTO web site (www.uspto.gov), from the Office of Public Records and from commercial sources. Should you receive inquiries about the use of the Office's PAIR system, applicants may be referred to the Electronic Business Center (EBC) at http://www.uspto.gov/ebc/index.html or 1-866-217-9197.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHELE FLOOD whose telephone number is (571)272-0964. The examiner can normally be reached on 7:00 am - 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Michele Flood
Primary Examiner
Art Unit 1655

MCF
December 7, 2009

/Michele Flood/
Primary Examiner, Art Unit 1655